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NO. 768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners,

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN
and WILLIAM D. TREEBY
Stone, Pigman, Walther,
Wittmann & Hutchinson
1209 Whitney Bank Building
New Orleans, Louisiana 70130

Attorneys for Columbia Pictures Corporation, Metro - Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corp., Petitioners.

BERNARD G. SEGAL and
EDWARD W. MULLINIX
Schnader, Harrison, Segal
& Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102
LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin,
Krim & Ballon
477 Madison Avenue
New York, New York 10022
GIBBONS BURKE
Chaffe, McCall, Phillips, Burke,
Toler & Sarpy
National Bank of Commerce
Building
New Orleans Louisiana 70112
Attorneys for National Screen
Service Corporation, Petitioner

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NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

National Screen Service Corporation (hereinafter "National Screen") and Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corp. (hereinafter "Producers") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 26, 1970.

OPINIONS BELOW

There was no opinion by the United States District Court for the Eastern District of Louisiana. That court's

orders granting summary judgment and the judgment confirming the orders are reprinted in the Appendix, pp. 19-26, *infra*. The Opinion of the Court of Appeals, which is reported at 421 F.2d 1313, (hereinafter "the Opinion") is also reprinted in the Appendix, p. 28, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1970,[1] and Petitioners' timely application for an en banc rehearing was denied on June 29, 1970.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review by this petition for certiorari is whether Respondent is barred from maintaining this suit by two prior adverse summary judgments in cases that Respondent and the Court of Appeals concede were factually identical with this suit except for the damage period involved.

STATUTES INVOLVED

The claim asserted by Respondent in the two prior cases and in the present case is a claim purporting to arise under the federal antitrust laws, but the question presented here does not involve interpretation or application of those laws.

STATEMENT OF THE CASE

This is the *third* of three successive treble-damage antitrust actions brought by the same motion picture

[1] Appendix, p. 27.
[2] Appendix, p. 44.

poster-renter "jobber", Exhibitors Poster Exchange, Inc., of New Orleans, against the same Producers[3] and National Screen charging all defendants with having conspired in restraint of trade and to gain a monopoly in the distribution of motion picture advertising accessories through National Screen.

Suit No. 1 — 1961

The first of the actions filed by Respondent was commenced on May 17, 1961 in the United States District Court for the Eastern District of Louisiana as Civil Action No. 11,145. This action is referred to in the Court of Appeals' Opinion and here as "Suit No. 1". The Complaint in Suit No. 1 alleged that Petitioners, since before 1947, had conspired in restraint of trade and that National Screen had an illegal monopoly in the manufacture and distribution of motion picture advertising posters and accessories in the New Orleans motion picture area, with the result that Respondent, in order to stay in business, had been forced to obtain all of its motion picture advertising posters and accessories from National Screen. The Complaint further alleged that on February 15, 1961 National Screen had given notice to Respondent that it would not continue to do business with it after May 16, 1961 and that on that date National Screen in fact stopped doing business with Respondent.

Suit No. 1 was brought against all of the Petitioners except Columbia Pictures Corporation.[4] Suit No. 1

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[3] Except as indicated in note 4 *infra* and accompanying text.

[4] Columbia Pitcures Corporation was named in the second and third suits. RKO Radio Pictures, Inc. was also named in the second and third suits but was never served with process. Allied Artists Southern Distributing Corporation and Buena Vista Distribution Co., Inc. were named in the first suit but not in the second or third.

sought (1) a restraining order, (2) a preliminary injunction, and (3) a finding of conspiracy and $300,000 in treble damages. A temporary restraining order issued on May 17, 1961 restraining all defendants from directly or indirectly refusing to deal with Exhibitors Poster Exchange, Inc. Numerous depositions, affidavits and other exhibits were offered into the record, and testimony was taken by the Petitioners to disprove the existence of the alleged conspiracy.[5] On July 26, 1961 motions for summary judgment were filed, with supporting documentation, and judgments were granted dismissing Suit No. 1 against Producers. The District Court judgment of dismissal in Suit No. 1 contained a determination and direction for entry of final judgment under Rule 54(b) of the Federal Rules of Civil Procedure and was, therefore, final and appealable. Respondent, however, did not appeal.

Suit No. 2 — 1964

On November 30, 1964, Respondent commenced its second action (Civil Action No. 15,125) against Petioners.[6] This action is referred to as "Suit No.2" here and in the Court of Appeals' Opinion. Conspiracy and monopolistic practices were again urged as the basis for treble damages, and preliminary and permanent injunctions were also sought. Once again the action was based on Sections 1 and 2 of the Sherman Act. The District Court consolidated Suit No. 1, which was still pending against National Screen, with Suit No. 2. All of the Petitioners filed motions for summary judgment, attaching the prior judgments in Suit No. 1, and urging res judicata and

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[5] Pages 4-6 of the original brief filed by the Producers in the Court of Appeals details these supporting materials.

[6] The parties differed from Suit No. 1 as indicated at p. 3 and n. 4 *supra*.

collateral estoppel as barring Respondent's case. After hearing, judgment was entered on June 16, 1965 dismissing Suit No. 1 and Suit No. 2. Respondent did not appeal.

Suit No. 3 — 1967

As noted in the Court of Appeals' Opinion, Respondent "seemed to thrive" on adverse judgments,[7] and on August 11, 1967 Respondent filed this third action (Civil Action No. 67-1160) against Petitioners. This is the action — referred to as "Suit No. 3" — here involved. The District Court had jurisdiction over Suit No. 3 by virtue of Sections 4 and 16 of the Clayton Act.[8] The Complaint in Suit No. 3 is identical in substance with the complaints in Suit No. 1 and Suit No. 2, except that Respondent seeks damages only from the date of filing of Suit No. 2, *viz.*, November 30, 1964.

In summary, Respondent again charges in Suit No. 3 that National Screen's discontinuing dealing with it in 1961 was done in furtherance of Petitioners' conspiracy to restrain trade in the distribution of motion picture advertising accessories for the Producers' motion pictures — as a result of which Respondent claims it sustained losses since the date of filing of Suit No. 2 in the approximate amount of $250,000, before trebling.

As complete defenses to Suit No. 3, which is the subject of this Petition for Certiorari, Petitioners pleaded that the dismissals by summary judgment of the two prior actions in the same District Court barred maintenance of Suit No. 3 under the principles of res judicata and collateral estoppel.

After considering oral testimony by Respondent's

[7] Appendix, p. 32; 421 F.2d 1313, at p. 1316.
[8] 15 U.S.C. §§ 15, 26.

President at two hearings and in depositions, the District Court in one of those prior actions (Suit No. 1) concluded that, "[T]here is here no genuine issue of fact to be submitted upon trial."[9] On the basis of the prior judgments, the court entered judgment in favor of Petitioners in Suit No. 3.

The complete identity of Respondent's claims in all three suits was not only expressly conceded in Respondent's briefs in both Courts below but expressly confirmed in Chief Judge Brown's opinion for the Court of Appeals.[10] In this connection, Respondent conceded in its brief in the District Court:

> "It is true of course that plaintiff has had two prior suits dismissed by entry of adverse judgments, and *although those suits involved the same defendants and the same alleged unlawful conduct*, * * * this suit is different from those suits in that in this suit plaintiff's claim is to recover damages for injuries suffered during a period of time wholly subsequent to the time involved in the other suits."[11]

In its brief in the Court of Appeals Respondent reiterated:

> "The basic question is whether plaintiff is precluded by summary judgments entered against it in two prior cases (known in the court below as C.A. No. 11145 and C.A. No. 15125) commenced by the same plaintiff, against the same defendants, and *based primarily upon the same alleged unlawful contracts entered into by defendants during the period 1940-1947.*"[12]

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[9] Civil Action No. 11,145, Judgment of June 16, 1965.
[10] 421 F.2d 1312, 1320, Appendix pp. 41-42.
[11] Original Brief for Exhibitors Poster Exchange, Inc. filed on April 19, 1968 in the District Court, p. 1. (Emphasis added.)
[12] Brief for Appellant in the Court of Appeals for the Fifth Circuit, filed December 3, 1968, p. 2. (Emphasis added.)

The Court of Appeals agreed that the claims in all three actions were based upon identical facts and recognized that:

> "It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen constituted an illegal conspiracy.
>
> • • •
>
> "It is equally clear, however, that the summary judgment in Suit No. 1 did not dispose of any issue regarding National Screen's attempt to monopolize. *But it was disposed of in Suit No. 2. This issue as well as National Screen's complicity in any conspiracy was necessarily* (sic.) *in Suit No. 2.*
>
> • • •
>
> "Thus, the Court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by depositions, pre-trial conferences, and other discovery devices *did not show* either monopolization, attempted monopolization, or conspiracy on the part of National Screen under §§ 1, 2 or both."[13]

Nevertheless, the Court of Appeals concluded that Respondent could attempt to prove damages occurring "subsequent to the cut-off date of Suit No. 2",[14] even though the alleged illegal activity relied on by Respondent had been ruled, on two prior occasions, insufficient to support Respondent's claims. It is this conclusion that Petitioners challenge.

This Statement of the Case would be incomplete with-

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[13] 421 F.2d 1313, 1320. Appendix pp. 41-42. (Emphasis added.)
[14] *Id.* at p. 1321, Appendix p. 43.

out brief reference to the long history of litigation by various poster-renters throughout the United States against National Screen and the Producers, all of which has challenged the same allegedly unlawful conduct.

In all of the poster-renter cases listed below,[15] from 1949 to 1961, each of the poster-renter plaintiffs — through the same attorney[16] — asserted the same claims based upon the same allegedly unlawful exclusive licenses. Each of these cases terminated in favor of Petitioners.

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[15](1) Lawlor v. National Screen Service Corporation, C.A. No. 10020 E.D. Pa., filed August 18, 1949.
(2) Lipp v. National Screen Service Corporation, C.A. No. 11136, E.D. Pa., filed June 30, 1950.
(3) Siegel v. National Screen Service Corporation, C.A. No. 11137, E.D. Pa., filed June 30, 1950.
(4) Schrader v. National Screen Service Corporation, C.A. No. 11138, E.D. Pa., filed June 30, 1950.
(5) Mitchel v. National Screen Service Corporation, C.A. 11376, E.D. Pa., filed September 14, 1950.
(6) Riff v. National Screen Service Corporation, C.A. No. 11597, E.D. Pa., filed November 15, 1950.
(7) Vogelstein v. National Screen Service Corporation, C.A. No. 11678, E.D. Pa., filed December 5, 1950.
(8) Lawlor v. National Screen Service Corporation, C.A. No. 22707, E.D. Pa., filed June 3, 1957.

The following appellate decisions involved the cases listed as (1)-(8) above:

Lawlor v. National Screen Service Corporation, 211 F.2d 934 (3rd Cir. 1954), rev'd, 349 U.S. 322 (1955). This appeal involved the case listed as number (1) above.

Lawlor v. National Screen Service Corporation, 238 F.2d 59 (3rd Cir. 1956), vacated, 352 U.S. 992 (1957). This appeal involved the cases listed above as (1), (3)-(8).

Lawlor v. National Screen Service Corporation, 270 F.2d 146 (3rd Cir. 1959, cert. denied, 362 U.S. 922 (1960). This appeal involved the case listed as (1) above.

Lipp v. National Screen Service Corporation, 290 F.2d 321 (3rd Cir. 1961), cert. denied, 368 U.S. 835 (1961). This appeal involved the cases listed as (2)-(8) above.

In addition, the first *Lawlor* case (number (1)) spawned three other excursions to this Court:

Lawlor v. National Screen Service Corporation, 350 U.S. 920 (1955). (Petition for certiorari dismissed on stipulation.)

Lawlor v. Honorable United States Court of Appeals for the Third Circuit, 351 U.S. 948 (1956). (Petition for leave to the file Petition for Mandamus denied.)

Lawlor v. National Screen Service Corporation, 359 U.S. 951 (1959). (Petition for certiorari dismissed on stipulation.)

[16] Mr. Francis Anderson was plaintiff's attorney in each of the cases listed above and in note 17 *infra*, except *Smith v. National Screen Service Corp.*

And, except for one, the cases since 1961,[17] which were also based on the same exclusive licenses and on the additional factor of National Screen's decision in May, 1961 to discontinue dealing with all poster-renter "jobbers", likewise terminated in favor of Petitioners.[18]

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[17] (9) Vogelstein v. National Screen Service Corporation, C.A. No. 29526, E.D. Pa., filed April 21, 1961.
(10) Smith v. National Screen Service Corporation, C.A. No. 9274, W.D. Okla., filed May 8, 1961.
(11) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 11145, E.D. La., filed May 17, 1961.
(12) Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 7665, N.D. Ga., filed July 17, 1961.
(13) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 15135, E.D. La., filed November 30, 1964.
(14) Pantzer v. Paramount Film Distributing Corp., C.A. No. 67 Civ. 1401 E.D.N.Y., filed May 7, 1965, transferred by Judge Palmieri to the Eastern District of Pennsylvania on August 25, 1965, where it was given the docket No. 38330.
(15) Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 67-1160, E.D. La., filed August 11, 1967.
(16) Poster Exchange, Inc. v. National Screen Service Corporation, C.A. No. 12497, N.D. Ga., filed February 26, 1969.

The following appellate decisions involved the post-1960 cases listed above as (9)-(16).

National Screen Service Corp. v. Poster Exchange, Inc., 305 F.2d 647 (5th Cir. 1962). This appeal involved the case listed as (12) above.

Vogelstein v. National Screen Service Corporation, 310 F.2d 788 (3rd Cir. 1962), cert. denied 374 U.S. 840 (1963). This appeal involved the case listed as (9) above.

Poster Exchange, Inc. v. Paramount Film Distributing Corp., 340 F.2d 220 (5th Cir. 1965), cert. denied, 381 U.S. 936 (1965). This appeal involved the case listed as (12) above.

National Screen Service Corp. v. Exhibitors Poster Exchange, Inc., 349 F.2d 891 (5th Cir. 1965). This appeal involved the case listed as (11) above.

Poster Exchange, Inc. v. National Screen Service Corporation, 362 F.2d 571 (5th Cir. 1966), cert. denied, 385 U.S. 948 (1966). This appeal involved the case listed as (12) above.

Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 421 F.2d 1313 (5th Cir. 1970). This appeal involved the case listed as (15) above, and is the subject of this Petition for Certiorari.

Poster Exchange, Inc. v. National Screen Service Corporation, C.C.H. Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970). This appeal involved the case listed as (12) above.

[18] The *Pantzer* case, identified as (14) in note 17 *supra*, was dismissed for want of prosecution. The one exception referred to in the text is the *Poster Exchange* case, identified as (12), in which the Court of Appeals for the Fifth Circuit has affirmed a judgment, against National Screen only [Poster Exchange, Inc. v. National Screen Service Corporation, CCH Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970)] summary judgment in favor of the Producers in that case having been earlier affirmed in Poster Exchange, Inc. v. Paramount Film Distributing Corp., 340 F.2d 220 (5th Cir. 1965), cert. denied, 381 U.S. 936 (1965). National Screen is now preparing a Petition for Certiorari seeking review of that decision.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION INVOLVED IS IMPORTANT TO THE ADMINISTRATION OF JUSTICE.

In view of the undisputed fact that Respondent is relying for the *third* time on the same facts as to Petitioners' liability that have so far resulted in two adverse judgments of dismissal, this Court should grant certiorari to prevent further repetitive litigation in this and other similar cases in accordance with the established principle laid down by this Court in *Baltimore Steamship Co. v. Phillips*[19] and *Napa Valley Electric Co. v. Railroad Commission.*[20] And to the Petitioners herein, the Court of Appeals' reversal of the summary judgment dismissing Suit No. 8 means more than a violation of the legal principle of res judicata and a resulting additional burden on crowded court calendars. To them it means a continuation of the seemingly endless chain of poster-renter actions which the same attorney has kept alive since 1949 with the resultant huge expense and dislocation that such litigation entails.

No more cogent expression of the importance of the doctrine of res judicata can be found than that of this Court in *Baldwin v. Iowa State Traveling Men's Association.*[21]

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest;and *that matters once tried shall be considered for-*

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[19] 274 U.S. 316 (1927).
[20] 251 U.S. 366 (1920).
[21] 283 U.S. 522, 525-526 (1931). (Emphasis added.)

> *ever settled as between the parties.* We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Certainly if the opinion of the Court of Appeals here is permitted to stand, the resulting erosion of the principle of res judicata will have far-reaching effects outside the Fifth Circuit. For if the opinion below stands, it will be an open invitation for disappointed litigants with groundless claims to rely on the device of finding new time periods for which to assert such claims over and over again in the expectation that they will eventually find a hospitable court.

The potential mischief in private antitrust litigation of the kind of procedure permitted by the court below can best be illustrated by reviewing the history of the poster-renter litigation itself. At least sixteen private actions have been filed against National Screen and the Producers by various poster-renters since 1949.[22] A number of the cases have been before this court,[23] some of them on more than one occasion.[24] The action permitted by the court below would revive claims by all of the losing plaintiffs in these cases who could allege new periods of damage following their earlier dismissals and under the reasoning below create new causes of action.

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[22] Notes 15, 17, *supra*.
[23] *Ibid.*
[24] *Ibid.*

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS BY THIS COURT AND DECISIONS BY OTHER COURTS OF APPEALS.

The court below rested its decision on the proposition that:

> "[S]ignificant actions (or non actions) occurring subsequent to 1961, either alone or in combination with acts which have been completed prior to 1961 except for their consequences, may be the basis for new claims for damages traceable to such significant actions (or non actions).[25]

The proposition quoted, as does the entire Opinion below, ignores the procedural context of this case and the representations of all counsel that Suits 1, 2 and 3 rely on the same operative facts as to liability. The Opinion below urges Respondent to allege post 1961 acts as to liability. In so doing the court below either ignored Rule 56(e) of the Federal Rules of Civil Procedure, or, without directly admitting that it was doing so, relied upon Respondent's different-damage-period theory of the case.

A. *The Motion for Summary Judgment Required Respondent to Assert Any "New Actions."*

Respondent did not assert "actions (or non actions)" occurring after 1961 in its complaint, in its affidavits in opposition to the motions for summary judgment or in its many briefs in the District Court and in the Court of Appeals. Respondent did not do so, and did not request the Court of Appeals to allow it to do so, because there are no such "actions or non actions".

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[25] Appendix, pp. 37-38, 421 F.2d at p. 1318.

The affidavit of William H. Cobb, the President and sole shareholder of the Respondent, filed in opposition to the motions for summary judgment sets forth the basis of Respondent's claim. This affidavit relates entirely to the so-called illegal license agreements between the Producers and National Screen which were made between 1940 and 1947. Respondent's opposing papers did not contradict the main thrust of the moving papers of the Petitioners which is that the alleged illegal activity here asserted is the same as that previously asserted. They confirmed it. Under the plain meaning of Rule 56(e) of the Federal Rules of Civil Procedure, Respondent was required to "set forth the specific facts showing that there is a genuine issue for trial." The District Court properly applied the second provision of that rule that "summary judgment . . . shall be entered"[26] against a party that "does not so respond",[27] because as even the Court of Appeals agreed, the legality, *vel non*, of the exclusive license agreements was no longer open to question by Respondent.[28]

B. *A New Damage Period Does Not Create a New Cause of Action.*

Respondent's sole reliance below was on the bare proposition that Suit No. 3 relates to a new time period growing out of an abatable wrong and, therefore, amounts to a new cause of action.

Respondent's theory is based on its uniquely distorted reading of this Court's opinion in *Lawlor v. National*

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[26] Rule 56(e), Federal Rules of Civil Procedure.
[27] *Ibid.*
[28] Appendix, pp. 41-42, 421 F.2d at p. 1320.

Screen Service Corp.[29] Respondent argued to the Court of Appeals as follows:

> "[M]ore fully, defendants [here Petitioners] seem to consider it preposterous for one to say that it is possible, under the law, for a plaintiff to start a suit, lose it, on the merits, by entry of a formal judgment of dismissal on the merits, take no appeal, and then, years later, start a second suit directed against the same defendants *and based primarily on the same alleged unlawful conduct.*
>
> "And yet that can be done according to Lawlor — as plaintiff [here Respondent] reads Lawlor."[30]

This reading of *Lawlor* ignores all of the differences between the prior and subsequent suits in *Lawlor* on which this Court there relied. The subsequent suit in *Lawlor* alleged a substantial change in the scope of National Screen's monopoly;[31] the subsequent suit in *Lawlor* involved five new producer defendants;[32] the prior "judgment" relied on in *Lawlor* was entered as part of a compromise between the parties;[33] and the subsequent suit in *Lawlor involved substantial new antitrust violations* occurring after the termination of the earlier suit.[34] None of those differences is present here. This case does not resemble *Lawlor* since here there is no meaningful change of parties between Suits No. 1 and 2 and Suit No. 3; the Respondent neither alleges nor relies on any

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[29] 349 U.S. 322 (1955).
[30] *Reply Brief On Behalf of Appellant Exhibitors Poster Exchange, Inc.*, filed in the Court of Appeals on March 7, 1969, p. 2.
[31] 349 U.S. at p. 328.
[32] *Id.* at p. 329.
[33] *Id.* at p. 324.
[34] *Id.* at p. 328.

new illegal conduct; there are no allegations suggesting an expanded scope of the asserted monopoly; and, the prior judgments did not result from a compromise.

Whether Respondent's reading of *Lawlor* was accepted by the Court of Appeals is unclear in its Opinion. In rejecting Petitioners' view that Suit No. 3 asserts the same cause of action relied on in the earlier cases, Chief Judge Brown's Opinion pointed to "significant actions (or non actions) occurring subsequent to 1961" as a potential "basis for new claims for damages traceable to such significant actions (or non actions)"[35] — thus suggesting agreement with Petitioners' reading of *Lawlor* as holding that the later suit was based on a new cause of action only because of factors in addition to the mere difference in the damage period.

But if that was, indeed, the holding below, the holding conflicts with *Lawlor* because, as we have already demonstrated, there are no additional factors here.

On the other hand, the Court of Appeals held that the record supports a potential new cause of action — in spite of Respondent's admission that there is nothing new. The decision below would thus appear to accept Respondent's argument that each new time period provides a new cause of action even though there is no change in the operative facts. If so, it is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Engelhardt v. Bell & Howell Co.*,[36] the only decision by a court of appeals which has involved the question whether *Lawlor's* finding of a new cause of action rested solely on the mere difference in time

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[35] Appendix, pp. 37-38, 421 F.2d at p. 1318.
[36] 327 F.2d 30 (1964).

period.[37] The court in that case expressly rejected the argument which Respondent relies on here, holding that the antitrust case before it did not involve a new cause of action and was properly dismissed as barred by res judicata:

> "Lawlor v. National Screen Service Corp., . . . relied upon by the plaintiff, is readily distinguishable factually from our present case. In Lawlor five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged. *In our present case the parties in all actions are identical and only continuing violations of the type involved in the prior actions and there adjudicated against the plaintiff are asserted.*"[38]

Since *Lawlor* is clearly distinguishable, the conflict of the decision below with a case prior to *Lawlor* in the Second Circuit *(Straus v. American Publishers' Ass'n)*,[39] is also meaningful for purposes of this Petition.

If construed as having embraced Respondent's analysis of *Lawlor*, the Opinion below would appear to be in accord with the view of the Sixth Circuit in *Cream Top Creamery v. Dean Milk Co.*[40] A clear conflict among the circuits is thus apparent and the confusion in applica-

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[37] *Id.* at pp. 35-36.
[38] *Ibid.* (Emphasis added.)
[39] 201 F. 306, 310 (2d Cir., 1912).
[40] 383 F.2d 358 (6th Cir. 1967). In a distinguishable factual context *Cream Top Creamery* is arguably contrary to *Englehardt*, *supra* notes 36-38. Snyder v. Riddell, 252 F.2d 23 (9th Cir. 1958), involving the application of res judicata in federal income tax litigation and presenting a problem resolved by this court in Flora v. United States, 357 U.S. 63 (1958), would also appear contrary to *Englehardt*. The pending petition for certiorari in Miller-Davis Co. v. Premiere Electrical Conctrustion Co., No. 374 October Term 1970, another antitrust suit with a res judicata issue, involves a question different from the one here.

tion of this Court's decision in *Lawlor* is graphically illustrated by the Opinion below. This Court should grant certiorari to clarify *Lawlor's* meaning and to resolve its conflicting interpretations by the Courts of Appeals.

The decision by the Court of Appeals here was wrong in another respect. There was no occasion for the court to reach the question of collateral estoppel, but when it did so it erred again. The court correctly concluded that it was "beyond doubt that Suit No. 1 disposed of the issue of whether the activities of the Producers and National Screen in 1961 constituted an illegal conspiracy,"[41] that Suit No. 2 disposed of the issue of National Screen's attempt to monopolize and that Respondent was, therefore, collaterally estopped on all issues arising out of facts which existed as of 1961. But the court felt that, "Left open, however, are actions, if any, which may be established by proof covering post 1961 activities (or non actions)."[42] Even this determination is in direct conflict with the decision in *Florasynth Laboratories v. Goldberg*[43] by the Seventh Circuit. Since this record conclusively establishes that there are no such "activities (or non actions)," even collateral estoppel compels affirmance of the District Court's decision granting summary judgment in favor of Petitioners.

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[41] Appendix, pp. 41-42, 421 F.2d at p. 1320.
[42] *Id.* at p. 43, and p. 1321.
[43] 191 F.2d 877 (1951).

CONCLUSION

For all of the foregoing reasons, Petitioners herein respectfully urge that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

BERNARD G. SEGAL and
EDWARD W. MULLINIX,
Schnader, Harrison, Segal & Lewis
1719 Packard Bldg.
Philadelphia, Pa. 19102

LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin, Krim & Ballon
477 Madison Ave.
New York, New York 10022

GIBBONS BURKE
Chaffe, McCall, Phillips, Burke, Toler & Sarpy
National Bank of Commerce Bldg.
New Orleans, Louisiana 70112
Attorneys for National Screen Service Corporation, Petitioner.

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN, and
WILLIAM D. TREEBY,
Stone, Pigman, Walther, Wittmann & Hutchinson
1200 Whitney Bank Building
New Orleans, Louisiana 70130
Attorneys for Columbia Pictures Corp.
Metro-Goldwyn-Mayer, Inc.,
Paramount Film Distributing Corp.,
Twentieth Century-Fox Film Corp.
United Artists Corporation,
Universal Film Exchanges, Inc.
and Warner Bros. Pictures Distributing Corp., Petitioners.

September 28, 1970

APPENDIX

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

Minute Entry Mitchell, J. June 21, 1968

This cause came on for hearing on another day on motion of the defendants, National Screen Service Corporation, Columbia Pictures Corporation, Metro Goldwyn Mayer, Inc., RKO Radio Pictures, Inc., Twentieth Cent-

ury Fox Distributing Corporation, United Artists Corporation, Universal Film Exchange, Inc. and Warner Bros. Pictures Distributing Corporation, for a summary judgment.

Present:

C. Ellis Henican, Jr., Esq.
Francis T. Anderson, Esq.
Glen B. Hester, Esq.
Attorneys for plaintiff
Philip A. Whittmann, (sic.) Esq.
William D. Treeby, Esq.
Attorneys for defendants

IT IS ORDERED that the motion of the defendants for summary judgment be, and it is, hereby granted upon the grounds of res judicata based upon the judgment of this Court in Civil Action 15125.

James G. Burke, Jr.

s/ L. L. M.

ORDER AMENDING MINUTE ENTRY OF JUNE 21, 1968

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

Minute Entry Mitchell, J. June 28, 1968

IT IS ORDERED that the Court's Minute Entry of June 21, 1968, be, and it is, hereby amended as follows:

Present:

E. Ellis Henican, Jr., Esq.

Francis T. Anderson, Esq.

Glen B. Hester, Esq.

Attorneys for plaintiff

Phillip A. Wittmann, Esq.

William D. Treeby, Esq.

Attorneys for Columbia Pictures Corp., Metro Goldwyn Mayer, Inc., Paramount Pictures Dist. Corp., United Artists Corp., Universal Film Exchanges, Inc. and Warner Bros. Pictures Dist. Corp.

Gibbons Burke, Esq.

Walter S. Beck, Esq.

Attorneys for National Screen Service Corp.

s/ L. L. M.

DISTRICT COURT SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff,

VS.

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Defendants

(Filed: July 8, 1968)

This matter came on for hearing on another day on motion for summary judgment filed by National Screen Service Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Ex-

changes, Inc., and Warner Bros. Pictures Distributing Corporation. The motion for summary judgment of the above-named defendants, having heretofore been granted on June 21, 1968, and the Court hereby expressly determining that there is no just reason for delay and expressly directing the entry of a final judgment in favor of defendants, National Screen Service Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation, pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED, ADJUDGED AND DECREED that the order entered herein on June 21, 1968 granting the motions for summary judgment in favor of the above-named defendants be and it is hereby made a final judgment of this Court, reserving to National Screen Service Corporation the right to pursue its counterclaim against the plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff, Exhibitors Poster Exchange, Inc., be and the same is hereby dismissed with prejudice as to the defendants, to-wit: National Screen Service Corporation, Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Exhibitors Poster Exchange, Inc., shall pay all costs and charges incurred by each of the defendants in these proceedings.

s/ Lansing L. Mitchell
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

July 8, 1968

ORDER AMENDING MINUTE ENTRY OF JUNE 21, 1968

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
CIVIL ACTION NO. 67-1160 SECTION "F"

EXHIBITORS POSTER EXCHANGE, INC.

Plaintiff

versus

NATIONAL SCREEN SERVICE CORPORATION,
METRO-GOLDWYN-MAYER, INC.,
COLUMBIA PICTURES CORPORATION,
PARAMOUNT PICTURES DISTRIBUTING CORPORATION,
RKO RADIO PICTURES, INC.
TWENTIETH CENTURY-FOX DISTRIBUTING CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. PICTURES DISTRIBUTING CORPORATION

Defendants

Minute Entry Mitchell, J. July 8, 1968

IT IS ORDERED that the Court's Minute Entry of June 21, 1968, be, and it is, hereby amended as follows:

To add Paramount Film Distributing Corporation as a defendant dismissed by this order.

s/ L. L. M.

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1968
NO. 26643
D. C. Docket No. Civ. 67-1160 "F"

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

"Per Brown, Chief Judge"
1/26/70

COURT OF APPEALS OPINION

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,
v.
NATIONAL SCREEN SERVICE CORPORATION
et al., Defendants-Appellees.
No. 26643.
United States Court of Appeals,
Fifth Circuit.
[421 F.2d 1313]

* * *

[p. 1314]

Before JOHN R. BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

JOHN R. BROWN, Chief Judge:

Here Exhibitors[1] is seeking reversal of the District Court's summary judgment in favor of the defendants. The District Court granted the summary judgment on the basis of the doctrines of res judicata and collateral estoppel, which doctrines are the natural points of dispute of such long continuing private anti-trust cases as this.

Exhibitors is a jobber or rental distributor of advertising posters for movies. There are two defendants. As a group the first — Producers — comprises the major movie companies,[2] which through their copyright rights

[1] Exhibitors Poster Exchange, Inc.

[2] The movie companies that are defendants in the present action are Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, 20th Century-Fox Film Corporation, United Artist Corporation, Universal Film Exchanges, Inc., and Warner Brothers Pictures Distributing Corporation.

have the sole right to produce or license the production of the advertising material for their movies. The second, and perhaps most direct, is National Screen.[3] Its economic role is a dual one (i) as the only major holder of a license to produce this material and (ii) a distributor of the material to motion picture exhibitors.

The history of the movie poster industry has been a history of almost continuous antitrust litigation since[4]

[p. 1315]

the early 1940s when the movie companies quit producing their own posters and started giving this right to National Screen. This litigation was produced when National Screen took steps toward vertically integrating its operation by supplying movie exhibitors directly thus eliminating the jobbers such as Exhibitors. National Screen at first did not persist in these efforts. When antitrust claims were brought it would enter into consent judgments under which it agreed to supply the jobbers with the posters it produced under the license from Producers. See Lawlor v. National Screen Service, 3 Cir., 1959, 270 F.2d 146; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647.

In spite of the consent judgments, several jobbers in

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[3] National Screen Service Corporation.

[4] The most complete history of this industry is set out in Lawlor v. National Screen Service Corp., 3 Cir., 1959, 270 F.2d 146, cert. denied, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742. See also Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122; Vogelstein v. National Screen Service Corp., E.D.Pa., 1962, 204 F.Supp. 591; Lipp v. National Screen Service Corp., E.D.Pa., 1960, 188 F.Supp. 245; Poster Exchange, Inc. v. National Screen Service Corp., N.D.Ga., 1963, 35 F.R.D. 558, aff'd, 5 Cir., [illegible] F.2d 320; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647.

the Philadelphia area brought another antitrust case alleging conspiracy and monopolistic practices. See Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122. Despite a momentary victory in the Supreme Court, which eliminated obstacles to a further factual inquiry, the tactic proved to be a mistake when, after the case was finally decided on the merits, the Third Circuit held that neither the licensing agreements nor the practices of National Screen were illegal. Lawlor v. National Screen Service Corp., 3 Cir., 1959, 270 F.2d 146, cert. denied, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742.

Armed now with *stare decisis*, National Screen in 1961 executed its plan to put the vertical integration into effect. That included the February notice to jobbers all over the country that it would no longer operate through middle men.

Undaunted by the Third Circuit's opinion, jobbers again brought suit. Exhibitors was no exception. On May 17, 1961, one day after the date on which National Screen was to cease supplying posters, Exhibitors brought suit in the United States District Court for the Eastern District of Louisiana against National Screen and eight Producers.[5] This became Suit No. 1.

Exhibitors alleged that the refusal of Producers to license Exhibitors to produce posters on a local basis was a "group boycott". Thus it alleged that National Screen

[5] With the exception of Columbia Picture Corporation all of the movie-company defendants in the present action were also defendants in the 1961 action.

and Producers were violating Sections 1[6] and 2[7] of the Sherman Act in that they were engaged in a "contract or conspiracy in restraint of trade" and were conspiring to give National Screen a monopoly and that National Screen was monopolizing or attempting to monopolize the industry. Exhibitors sought triple damages under the private-attorney-general authority given by § 15 of the Clayton Act[8] and sought to enjoin the defendant from engaging in the alleged illegal conduct in the future.

[p. 1316]

Exhibitors was granted a preliminary injunction against all parties. But, after the depositions of Exhibitors' President, and National Screen's local manager were taken and upon motion and affidavits of officials of Producers, the Court granted a summary judgment in favor of Producers and dissolved the injunction. National Screen was, however, retained as a party defendant.

In 1964, after a pre-trial conference and as the trial with only National Screen as a defendant neared, Exhibitors filed Suit No. 2 in the same court. In Suit No. 2 the Producers[9] were again named defendants and Exhibitors again stated the same facts — the 1961 refusal to deal — but sought only to recover the damages suf-

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6 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be *illegal* * * *." 15 U.S.C.A. § 1.

7 "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C.A. § 2.

8 15 U.S.C.A. § 15. In Suit No. 1 Exhibitors sought $300,000 in damages.

9 In Suit No. 2 Columbia Pictures Corp. was a defendant.

fered since the summary judgment in Suit No. 1. The trial on the remaining part of Suit No. 1 was postponed and the two suits were merged. All defendants — National Screen and Producers — moved for summary judgment and the Court granted all the motions. As in Suit No. 1 no appeal was taken.

Exhibitors was undaunted. Adverse judgments were the fuel on which it seemed to thrive. And in 1967 the present Suit, No. 3, was instituted against the same defendants in which Exhibitors asked for damages from the time of filing Suit No. 2. Again all defendants moved for summary judgment and the District Court by invoking the doctrines of res judicata and collateral estoppel undertook to lay the antitrust claims of this jobber to rest.[10]

[1] The defendants pressed these doctrines on the District Court as though they were to be used as clubs to accomplish the policy embedded in them: the prevention of a repetitive litigation. The doctrines must be used, however, not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation. In addition, it must be remembered that the use of these doctrines can cloak a party in perpetual immunity and thus possibly protect conduct lasting long past the prior judgment — conduct that the law may grow to abhor.

Our attempt to carve our way through these doctrines and this litigation convinces us that the District Court erred. Although res judicata and collateral estoppel do

[10] Other jobbers have also been persistent in their claims. See The Poster Exchange, Inc. v. National Screen Service Corp., N.D.Ga., 1969, 306 F.Supp. 491.

slice away much, there are still controverted issues upon which Exhibitors may recover if it can meet its considerable burden of proof.

I.

[2, 3] Res judicata must first be dealt with. It is only where the prior judgment does not fit into that doctrine that there need be inquiry into the collateral estoppel effect of such judgment. Of course, the doctrine is that "a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." Lawlor v. National Screen Service Corp. 1955, 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122, 1127.

Here there is no problem with the identity of the parties. The problem is whether the present action — Suit No. 3 — is "based on the same cause of action" as either Suits No. 1 or No. 2. The answer here depends on the nature of the right of action granted under the antitrust laws. It is Exhibitors' contention that the alleged wrongs — the § 1 conspiracy in restraint of trade, and the § 2 conspiracy to monopolize, and monopolization — are, if not a series of new torts successively perpetrated, at least in the nature of continuing torts. It argues that there is no res judicata effect to either judgment because each new accrual of damage gives rise to a new claim for which relief can be granted —

[p. 1317]

that the damages occurring since Suit No. 2 have given rise to a new cause of action.

The defendants, on the other hand, argue that there is and has been only one cause of action — the alleged concerted refusal in 1961 of the National Screen and Producers to deal with Exhibitors. They contend that there has been prior adjudication that that conduct is not in violation of either § 1 or § 2 of the Sherman Act (see notes 6 and 7 *supra*).

Exhibitors relies upon the Supreme Court's 1955 decision in Lawlor v. National Screen Service Corp., *supra*, a case involving National Screen's earlier attempt to eliminate jobbers. There National Screen and the movie companies argued that a 1942 consent judgment under which National Screen agreed to supply advertising material to jobbers was res judicata. The jobbers, however, there alleged that since the entry of the prior judgment National Screen had engaged in new monopolistic practices — deliberately slow deliveries, tie-in sales, and others — and that five other producers had joined the conspiracy.

The Supreme Court held that the prior judgment was not a bar. The Court held that the additional claims coupled with the fact that in those circumstances the continuing conduct gave rise to more than one cause of action. [sic.] The Court said:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct — for example, an abatable nuisance — may frequently give rise to more than a single cause of action. And so it is here. The conduct frequently complained of was all subsequent to the 1943 judgment. In addition,

there are new antitrust violations alleged here — deliberately show [sic.] deliveries and tie-in sales, among others — not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories had increased to nearly 100%. Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment does not constitute a bar to the instant suit."

At 349 U.S. 328, 75 S.Ct. 868-869, 99 L.Ed. 1127-1128.

Defendants argue that *Lawlor* is not controlling because of the subsequent, independent new antitrust violations alleged there. They find support for this distinction in Englehardt v. Bell & Howell Co., 8 Cir., 1964, 327 F.2d 30, 36. They also point to the decision of this Court in Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 5 Cir., 1961, 295 F.2d 362 where we held that an antitrust claim was barred by the doctrine of res judicata since the same fact situation had been the basis for an unsuccessful action based upon breach of a contract to deal. But see, International Rys. of Central America v. United Fruit Co., 2 Cir., 1967, 373 F.2d 408, 419, cert. denied, 1967, 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed.2d 975.

National Screen and Producers also argue that the definition of a cause of action for purposes of determining whether the statute of limitations has run is the same one that should be used here for determining if res judicata is applicable. It is clear that for Statute of Limitations purposes the courts have held that a claim under the antitrust acts is not in the nature of a continuing tort or a nuisance. For that purpose the cause of action is said to arise "from the commission of the last overt act causing injury or damage." *Garelick v.*

[p. 1318]

Goerlich's Inc., 6 Cir., 1963, 323 F.2d 854[11]

[4] These statute of limitation cases do not compel the result urged on us here. "The determination of the meaning of 'cause of action' for purposes of deciding whether or not a person has slept on his rights is of little aid in deciding whether a prior judgment is a bar to the present action." Williamson v. Columbia Gas & Electric Corp., 3 Cir., 1950, 186 F.2d 464, 469. There the concern is about preventing the presentation of stale claims: Here the concern is with preventing repetitive litigation while preserving the opportunity to be heard and insuring that the policy of the antitrust acts are carried out.

Neither *Englehardt, supra* nor *Norman Tobacco &*

[11] For other cases reaching this same result see Baldwin v. Leow's Inc. 7 Cir., 1963, 312 F.2d 387; Steiner v. 20th Century-Fox Film Corp., 9 Cir., 1956, 232 F.2d 190; Crummer Co. v. DuPont, 5 Cir., 1955, 223 F.2d 238, cert. denied, 1956, 350 U.S. 848, 76 S.Ct. 85, 100 L.Ed. 755; Momand v. Universal Film Exchanges, 1 Cir., 1948, 172 F.2d 37, cert. denied, 1949, 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118; Schenley Inds., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, D.N.J., 1967, 272 F.Supp. 872; Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., S.D.N.Y., 1961, 193 F.Supp. 401; Molinas v. National Basketball Ass'n, S.D.N.Y., 190 F.Supp. 241; Fleischer v. A. A. P., Inc., S.D.N.Y., 1959, 180 F.Supp. 717. For cases taking a somewhat different approach see DeLaughter v. Borden Co., 5 Cir., 1966, 364 F.2d 624, 629-630; Delta Theatres, Inc. v. Paramount Pictures, Inc., E.D.La., 1968, 158 F.Supp. 644, 649.

Candy Co., supra is decisive. In *Englehardt*, although the Court found it necessary to distinguish *Lawlor*, the cases were substantially different. In *Englehardt* there was a single breach of a contract. There was one and only one refusal to deal and only one transaction. Likewise in *Norman Tobacco & Candy Co.*, where the first suit was tried on a breach of contract theory, there was one and only one transaction — essentially a prospective buyer's effort to procure and the seller's refusal to deal. In effect it was the claim that at a time certain the defendant did an illegal act which caused damages (i) between that date and the filing of the suit and (ii) since the fil'ng of the suit down to the present and (iii) in the future.

But the statute of limitation cases do not reach situations in which the damages come — or are alleged to come — not from a prior act or series of acts which have been completed except in their consequences, but rather from actions (or non actions) subsequently occurring, either alone or in combination with the "completed" actions. Unless the statute of limitation cases are confined to the former situation a policy of repose is transmuted into an unexpected and wholly gratuitous notion of perpetual immunity. As *Lawlor* warns, it is imperative that we not "confer [these defendants] * * * immunity from civil liability for future violations." Lawlor, *supra*, at 349 U.S. 329, 75 S.Ct. 869, 99 L.Ed. 1128.

[5] In light of these policies we must hold that significant actions (or non actions) occurring subsequent to 1961, either alone or in combination with acts which have been completed prior to 1961 except for their consequences, may be the basis for new claims for damages

traceable to such significant actions (or non actions). In that situation the harm that is claimed in Suit No. 3 is not that arising out of the particularized activities resolved in Suit No. 1 or No. 2. Old claims, then, are not being reasserted. A new claim has been alleged. Whether the new claim thus stated is one which under our federal rules is a claim upon which relief can be granted is a matter of substantive antitrust law, considered in the light of the *stare decisis* effect of the cases, and not a matter of res judicata or estoppel by judgment.

[6] When the pleadings in the present case are given that liberal reading called for by Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, and its progeny, see e. g. Pred v. Bd. of Public Instruction, 5 Cir., 1969, 415 F.2d 851, the District Court may conclude

[p. 1319]

that they adequately allege that there has been new illegal conduct, not merely continuing damages from old, and now insulated, illegal conduct, in violation of the antitrust laws and therefore stating a claim upon which relief can be granted. Such a claim would be a new cause of action — No. 3 would not be No. 1 nor No. 2.

II.

[7] Although No. 3 would be a new cause of action and res judicata inapplicable thereto, Exhibitors might still be barred from further action on certain issues by collateral estoppel. The doctrine is classically stated by Mr. Justice Field in Cromwell v. County of Sac, 1877, 94 U.S. 351, 24 L.Ed. 195 when he says that in "a second action between the same parties * * * upon a different

claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." at 94 U.S. 353, 24 L.Ed. 198. It forecloses inquiry only as to those issues which were necessarily determined. United States v. Burch, 5 Cir., 1961, 294 F.2d 1, 5.

[8] Thus it is necessary to determine what were the "matters in issue or points controverted" in Suits No. 1 and No. 2. This determination is to be made on the basis of the prior records. The process was generally described by Mr. Justice Day: "To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy." United Shoe Machinery Corp. v. United States, 1922, 258 U.S. 451, 459, 42 S.Ct. 363, 366, 66 L.Ed. 708, 718.

[9] We reject out of hand the beguiling but superficial contention of Exhibitors that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.

It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence — plaintiff's, defendant's, or all — of a directed verdict. Indeed, a

more positive adjudication is hard to imagine.[12] It is determination that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). And it most certainly encompasses ultimate facts of the kind here involved. The only enigma involved is determining which of one or more multiply [sic.] decisive issues of fact the Court on summary judgment determined was totally lacking in legal significance. If a claim requires elements 1, 2 and 3 for recovery, summary judgment is proper if 2 is missing. But this would not give to a summary judgment based thereon a perpetual cloak to forbid inquiry into 1 or 3, or both. This would distort the wholesome policy behind collateral estoppel. As with many other wonderful tools to cope with today's exploding demands on judicial energy, care must be used by Trial Judges in reflecting the basis for their action. Thus while it is true that we and others often point out that so-called findings of fact are superfluous (if non-existent) in a summary judgment,[13] this is a long way from saying that Trial Judges should not excise the issue or issues determined to be without

[p. 1320]

genuine controversy. On the contrary everything in the rules and good administration calls for an articulate reflection of the basis for the Judge's ruling. Had that been done as to Suit No. 1, and again as to Suit No. 2, our task would have been greatly simplified.

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[12] For cases giving collateral estoppel effect to summary judgments see Hyman v. Regenstein, 5 Cir., 1958, 258 F.2d 502, 510, cert. denied, 1959, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575; Wolcott v. Hutchins, S.D.N.Y., 1968, 280 F.Supp. 559, 563.

[13] See Hindes v. United States, 5 Cir., 1964, 326 F.2d 150, 152; United States for Use and Benefit of Industrial Instrument Corp. v. Paul Hardeman, Inc., 5 Cir., 1963, 320 F.2d 115, 116; Shehi v. Southwestern Bell Tel. Co., 10 Cir., 1967, 382 F.2d 627, 629.

But now that this is an enigma wrapped in a mystery we must follow Mr. Justice Day's instruction, United Shoe Machinery Corp., *supra*, and look to the records in Suits No. 1 and No. 2 to determine which issues were necessarily decided. The issues presented by the complaint are (1) whether the 1961 refusal to deal was the product of a conspiracy in restraint of trade between National Screen and Producers forbidden by § 1 of the Act and (2) whether under § 2 National Screen monopolized or attempted to monopolize the industry by the actions in 1961.

It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen in 1961 constituted an illegal conspiracy.[14] Except for identification of each Producer the motions for summary judgment were identical. "The above Depositions, Transcript and Letter show conclusively that Defendant [name of movie company] has never conspired to give Defendant National Screen Service Corporation a monopoly in the manufacture and distribution of motion picture advertising posters in the New Orleans area and show, on the contrary, that Defendant has at all times indicated its willingness to deal with the plaintiff, Exhibitors Poster Exchange, Inc." Whether rightly or wrongly, these facts (or legal facts) were accepted by the Trial Court. This was the only basis for the motions and this issue was thus necessarily disposed of by the court's summary judgment. We would emphasize, however, that this relates to 1961 conduct, not subsequent conduct within the reach of the complaint in Suit No. 3.

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[14] We have obtained from the District Court the complete record in Suits No. 1 and No. 2 as well as the present case. This painstaking examination, page by page, brief by brief, was one really for the Trial Court, and more accurately, for counsel.

It is equally clear, however, that the summary judgment in Suit No. 1 did not dispose of any issue regarding National Screen's attempt to monopolize. But it was disposed of in Suit No. 2. This issue as well as National Screen's complicity in any conspiracy was necessarily [sic.] in Suit No. 2. National Screen submitted two motions asking for relief. The first was filed on Dec. 14, 1964 before the remaining part of Suit No. 1 was merged with Suit No. 2. The second was filed on Jan. 29, 1965 after the merger. The first is entitled a motion for summary judgment and the second is entitled a motion for dismissal on the pleadings. Each motion was supported by memorandum. The theme of both is that there should be judgment for National Screen on both the § 1 issue of conspiracy and the § 2 issue of monopolization since other courts in other cases had held that on the basis of similar allegations there was no illegal conduct.

The Court granted National Screen the relief sought and gave two reasons. First the Court believed that the doctrine of res judicata was applicable. The court gave a second reason, however. The court relied on the decision of the United States District Court for the Northern District of Georgia to find that the *Lawlor* decision by the Third Circuit was controlling on the question of the legality of National Screen's conduct. Thus the court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by deposition, pretrial conferences, and other discovery devices did not show either monopolization, attempted monopolization, or conspiracy on the part of National Screen under §§ 1, 2 or both. But

[p. 1321]

all was with respect to actions done or not done in 1961.

[10] The effect of the order in Suit No. 1 and the order in Suit No. 2 is to wipe out all claims against Producers as well as National Screen arising out of actions (or non actions) of 1961, and in so far as Suit No. 3 might have expanded these actions, for damages encompassed by Suit No. 2.[15] Left open, however, are actions, if any, which may be established by proof covering post 1961 activities (or non actions) which substantively are violations of the antitrust laws and the resulting damages therefrom occurring subsequent to the cut off date of Suit No. 2.

The burden may be a heavy one, but Exhibitors is entitled to attempt to bear it. We thus must remand the case to the District Court. We do so, however, without even the slightest murmur of a suggestion as to how it will or should come out. Pred v. Board of Public Inst., 5 Cir., 1969, 415 F.2d 851, 860.

Reversed and remanded.

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[15] It should be emphasized that in disposing of Suit No. 2 the Trial Court considered that it was all 1961 activity which gave rise to the claim of § 1 conspiracy or § 2 monopolization. It did not undertake to view Suit No. 2 in the way we look on Suit No. 3 as alleging something new and beyond Suit No. 1. Hence, on the inquiry of what was necessarily determined in Suit No. 2 we accept the Trial Court's reading of the complaint as a claim arising out of 1961 actions with damages resulting in 1964 on.

COURT OF APPEALS
ORDER DENYING REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 26643

EXHIBITORS POSTER EXCHANGE, INC.,

Plaintiff-Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(June 29, 1970)

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 763

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners,

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

FRANCIS T. ANDERSON
1189 Allied Avenue
Yonkers, Pennsylvania 19000

SANDERS, HESTER, HOLLEY, ARMSTRONG & BOOKER
P. O. Box 1230
Augusta, Georgia 30903

NEMICAN, JAMES & CLEVELAND
225 Baronne Street, Suite 2001
New Orleans, Louisiana 70112

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IN THE
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---

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. When a suit based upon a continuing monopoly contains claims only for losses suffered after the termination of a prior suit is the suit based on the same cause of action as that of the prior suit?

2. Can a collateral estoppel arise out of a summary judgment if there has been no trial, no verdict of a jury and no findings entered by any trier of fact?

ARGUMENT

There is plainly no ground for certiorari.

All that has happened is that the Court of Appeals has ordered that the case go to trial, and trial proceedings may result in making certiorari undesirable to either party or to both parties. That is to say, either party may turn out to be the winner of the case or it may be settled. There is no authority for the proposition that certiorari should be issued in such a situation.

On the merits, however, it is plain that no error has been committed.

The complaint[2] alleges not only a conspiracy to monopolize but an actual, completed monopoly which has been for many years, and is now being, continuously operated on a national scale.

It is true that two preceding cases, based on the same monopoly, have been dismissed by summary judgment, but there has been no trial in any of the three cases involved, and in this (third) case the respondent claims to recover damages only for losses suffered after the occurrence of the losses complained of in the preceding cases.

In other words, respondent concedes that res judicata bars re-assertion of the claims alleged in the preceding cases, but contends that the present suit is not

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[2] A full copy of the complaint is appended hereto at pages 17-28, *infra*.

barred because it is based on new claims for damages for new losses and therefore constitutes a new and different cause of action: *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955).

And there is no collateral estoppel because, since there has been no trial there has been no verdict or findings, by court or jury, with respect to any issue (id.)

More fully, collateral estoppel is defined and explained in *Restatement, Judgments*, sec. 68 (1), (2) and Comment c. as follows.[a]

"TITLE E. EFFECT ON OTHER CAUSES OF ACTION - COLLATERAL ESTOPPEL

§68. QUESTIONS OF FACT.

(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§69, 71 and 72.

(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not ac-

---

[a]This section of the Restatement has been frequently cited by this court. See, for example, *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 at 326, note 6.

> tually litigated and determined in the first action."
>
> ...
>
> "c. *Where a question of fact is actually litigated.*
>
> Where a question of fact is put in issue by the pleadings and is submitted to the jury or other trier of facts for its determination, and it is determined, the question of fact is actually litigated, and the judgment is conclusive between the parties in a subsequent action on a different cause of action . . ."

Petitioners do not say, and cannot truthfully say, that any question of fact involved in this case has ever been litigated and determined, in any suit in which plaintiff was a party, by any jury or other trier of facts, and therefore there can be no estoppel.

There is hardly any reason to say anything more than this, but out of an abundance of caution a number of additional points will be mentioned.

(1)

Petitioners — oddly enough — attempt to make much of the fact that out of some fourteen or more cases previously commenced against them by other poster renters all "except one" resulted in victories for them.

When the full and true picture is seen, however, petitioners are not made to look so very good.

The fact is that throughout all the many years of litigation in these matters, only two cases have been tried — viz: (1) the *Lawlor* case (reported at 270 F. 2d 146, 3 Cir. 1959) and (2) the *Poster Exchange* case (decided August 24, 1970 by the Court of Appeals for the Fifth Circuit, opinion reproduced in CCH Trade Reg. Reports §73, 305 and appended to this brief at pages 26-40, *infra*.)

Of those two tried cases, the petitioners won the first but lost the second. (The second went to trial against only one of petitioners, viz: National Screen Service Corporation.)

The tried case that petitioners won — the *Lawlor* case — turned on the fact that during the period of time involved in that case (1943-1949) it was the general practice of petitioners to make supplies of posters available to competitors at reasonable prices, as a result of which the plaintiff, Lawlor, was able to and did get all the supplies he needed, and was therefore unable to prove that he had suffered any injury or loss as a result of the monopoly.[3]

More specifically, the trial judge in the *Lawlor* case found as a fact, *inter alia*, as follows:

> " 57. All motion picture company defendants, so long as they were handling their own

---

[3]The complaint filed in the instant case (Section 19, *infra* p. 22) alleges that plaintiff is unable to obtain any supplies in any amount.

accessories, made all such accessories freely available to plaintiffs.

" 73. From April 21, 1943, the date of the sublicense to the plaintiffs from National Screen, and throughout the period in suit the plaintiffs received from National Screen all of the standard accessories which they ordered . . ."

. . .

"118. Plaintiffs failed to submit evidence sufficient to support their allegations in plaintiffs' amended complaint that National Screen, in an effort to destroy plaintiff's business, deliberately and maliciously failed to fulfill plaintiffs' requirements and requests for standard accessories in time for plaintiffs to service and deliver such standard accessories to their exhibitor customers."

. . .

"122. During the period in suit, i.e., from 1943 to 1949, plaintiffs' business was progressively more successful, with increased gross volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year

between 1943 and 1949."

...

"138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

The court entered no finding of fact with respect to either monopoly or conspiracy, and only qualified conclusions of law.

On the other hand, in the case that was tried and won by the plaintiff — the *Poster Exchange* case — the plaintiff was able to prove, and did prove, that it had been denied access to an adequate supply of posters, and the court found as a fact that respondent National Screen Service Corporation was guilty of a continuous and continuing operation of a highly predatory monopoly, and awarded plaintiff damages in the trebled amount of $450,000. As beforesaid, this judgment was affirmed by the Court of Appeals in an opinion dated August 24, 1970, a copy of which is appended to this brief at pages 26-40, and is reported in CCH Trade Reg. Reports §73,305.

In view of these facts petitioners' statement (at pages 10-11) that they have been — or will be — greatly harrassed by "disappointed litigants with groundless claims" must be taken with more than a grain of salt, to say the least.

(2)

At page 10 petitioners speak of "the undisputed fact that Respondent is relying for the *third* time on the same facts as to Petitioners' liability that have so far resulted in two adverse judgments of dismissal ..."

That is not true at all. Respondent is relying on the fact that during the period of time beginning November 30, 1964 and ending August 11, 1967 (when the complaint was filed) petitioners continuously operated their business in violation of the antitrust laws which caused respondent to suffer continuing losses in its business, none of which losses was referred to, or was in any sense embodied in, either of the two earlier actions.[4]

In *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U. S. 481, this Court, dealing with a similar situation, described it as follows (349 U.S. at 502, note 15):

> "... We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. Emich Motors Corp. v. General Motors Corp. 229 F 2d 714 (CA 7th Cir. 1956), upon which United relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act

---

[4] The Clayton Act (sec. 16, 15 U.S.C. sec. 26) provides in effect that a continuing conspiracy is abatable, and therefore an antitrust plaintiff cannot be heard to claim damages for future or anticipated losses, as can be done, for instance, in personal injury cases. Cf. *Lawlor v. National Screen Service Corporation* (*supra*) 349 U.S. 322, 327-328, notes 13, 14.

> and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."

What was said by this court in *Lawlor v. National Screen Service Corporation (supra)* 349 U.S. 322, 329, is equally true here — viz:

> "...Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

(3)

At page 13 petitioners say:

> "... Under the plain meaning of Rule 56(e) of the Federal Rules of Civil Procedure Respondent was required to 'set forth the specific facts showing that there is a genuine issue for trial'."

That statement implies, of course, that petitioners' motion for summary judgment was "supported" by the filing of affidavits and/or other evidentiary material referred to in Rule 56(e), but the implication is wholly false in fact. The motion was not so "supported," and therefore there is no justification or ex-

cuse for petitioners' dragging Rule 56(e) into this proceeding.

(4)

At page 11 petitioners say:

> "... The action permitted by the court below would revive claims by all of the losing plaintiffs in these [prior] cases who could allege new periods of damage following their earlier dismissals and under the reasoning below create new causes of action."

If that were true it would, indeed, be a very good thing, but it is probably not true because of the effect of the statute of limitations.

Some way, however, should be sought to bring aid to the many unfortunate poster renters who have been ruthlessly driven out of business by these conscienceless monopolists.

In so speaking, respondent does not go beyond — or not far beyond — the findings of the trial judge in the *Poster Exchange* case, which as aforesaid, were confirmed by the Court of Appeals in an opinion handed down on August 24, 1970, and reproduced in this brief at pages 26-40, *infra*.

More fully, in the *Poster Exchange* findings the trial judge dealt with the question of National Screen Service Corporation's veracity, and stated, in substance

and effect, that he could hardly believe anything that that petitioner might say:

> "... In view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring these businesses by outright purchase."

That happened in the year 1940. Since then how many others have been driven out, with or without purchase, but certainly without a trial, Heaven only knows.

It would seem, therefore, that Chief Judge Brown did not go too far when, in his opinion in *Poster Exchange*, he referred to "... the grossly predatory practices engaged in by National Screen..."[8] (See infra p. 39).

(5)

At page 10 petitioners say:

> "To them [petitioners] it [the judgment below] means a continuation of the seemingly endless chain of poster-renter actions which the same attorney has kept alive since 1949

---

[8] As aforesaid, *Poster Exchange* went to trial against National Screen Service Corporation only, but the fact is that the contractual arrangements require that corporation, as licensee, to pay a share of its profits — usually fifty per cent — to the film-company licensors — the other petitioners herein.

> with the resultant huge expense and dislocation that such litigation entails."

And there is considerable truth in that.

That is to say, according to the aforementioned judgment in the *Poster Exchange* case (affirmed as aforesaid, by the Court of Appeals on August 24, 1970, in an opinion reproduced at pages 26-40, *infra*) one petitioner is about to be dislocated from half a million dollars, and it does seem that there may be more such dislocation coming. Petitioners, however, can always break the "endless chain" of actions by the simple expedient of refraining from further violations of the antitrust laws.

(6)

At page 17 petitioners say:

> "This Court should grant certiorari to clarify *Lawlor's* meaning and to resolve its conflicting interpretations by the Courts of Appeals."

Lawlor's meaning is plain enough to anyone able to read English.

The Court gave three separate, distinct and independent reasons why the second of the two suits involved therein was on a cause of action different from that in the first suit, viz:

1. The claim for damages made in the second suit was not and could not have been included in the first suit because of the abatable nature of the wrong alleged.

2. In the second suit the plaintiff alleged several new restraints different in kind from the restraints alleged in the first suit.

3. Five of the nine defendants named in the second suit joined the alleged conspiracy after the first suit was concluded.

It is obvious that the first reason would have been held sufficient in the absence of the other two. The first reason, indeed, was the sole basis for the result reached in all the many precedents cited by the Court. The second and third reasons were introduced by the expressions "In addition"[6] and "moreover."[7] There was no suggestion that the reasons should be considered in combination or that they had any cumulative effect. The consideration of overriding importance was that no person should be permitted to gain immunity from liability for future violations of the antitrust laws, and therefore the first reason, standing alone, would have to be held sufficient.

In support of their contention that *Lawlor* needs clarification, petitioners rely on *Englehardt v. Bell & Howell Co.* (8 Cir. 1964) 327 F. 2d 30, in which the court

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[6]*Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328.
[7]*Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328.

dismissed a second related suit on the ground of res judicata.

Englehardt is said to construe *Lawlor*[8] differently from the court below, whereas the opinion in *Cream Top Creamery v. Dean Milk Co.* (6 Cir. 1967) 383 F. 2d 358, coincides with that of the court below.

This is supposed to create "a clear conflict among the circuits . . ." (petition p. 16).

Actually there is nothing even remotely resembling a conflict.

As stated in the opinion delivered by the District Court in Englehardt[9] — and adopted by the Court of Appeals (see 327 F. 2d at p. 31) that case was based solely on "an alleged termination of a dealer's franchise." As the court — in effect — said, the case involved only "a single controversy which is capable of being completely determined in one suit" (214 F. Supp. at 197).

Therefore, of course, *Englehardt* was correctly decided under *Lawlor* on the basis of the construction given *Lawlor* by the court below.

In other words, none of the three saving features relied on in *Lawlor* was present in *Englehardt*.

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[8]*Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328.
[9]*Englehardt v. Bell & Howell Co.* (D.C. E.D. Mo. 214 F. Supp. 195.)

In distinguishing *Englehardt* the court below indeed, expressly said: (421 F. 2d at 1318, Petition p. 37)

> "In Englehardt there was a single breach of a contract. There was one and only one refusal to deal and only one transaction."

Petitioners, wholly ignoring that part of the court's opinion, serenely proclaim that the decision below:

> "is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Englehardt v. Bell & Howell Co.*..." (pet. p. 15, at bottom)

which is enough to make one wonder who is trying to fool whom.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

FRANCIS T. ANDERSON
1103 Alfred Avenue
Yeadon, Pennsylvania 19050

GLENN B. HESTER
P. O. Box 1226
Augusta, Georgia 30903

C. ELLIS HENICAN, JR.
225 Baronne Street
New Orleans, Louisiana 70112

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same, properly addressed, in the United States Mail, with adequate postage affixed thereto on this day of October, 1970.

C. ELLIS HENICAN, JR.

APPENDIX

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

EXHIBITORS POSTER EXCHANGE, INC.

versus

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORPORATION, METRO GOLDWYN MAYER, INC., PARAMOUNT PICTURES DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY FOX DISTRIBUTING CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION

The complaint of Exhibitors Poster Exchange, Inc. respectfully alleges that:

1.

This complaint is filed under sections 4 and 12 of the Act of Congress of July 2, 1890, C.647, 26 Stat.609, (15 U.S.C. §15 and §26) commonly known as the Clayton Antitrust Act, for recovery of treble damages, attorneys' fees, and injunctive relief, to restrain continuing violations by defendants, as hereinafter alleged, of Sections 1 and 2 of the Act of Congress of October

15, 1914, C.323, 38 Stat. 730 (15 U.S.C. sections 1 and 2) commonly known as the Sherman Antitrust Act.

2.

Each of the defendants transacts business in interstate commerce within the Eastern District of Louisiana and is found therein.

3.

Plaintiff is a corporation, organized under the laws of the State of Louisiana, with its principal office in the City of New Orleans, Louisiana.

4.

Since the year 1939 plaintiff has been engaged in the business of servicing motion picture exhibitors with supplies of motion picture advertising posters in the New Orleans motion picture district.

5.

Motion picture advertising posters are known as "standard accessories" and "specialty accessories".

6.

The term "standard accessories", as used herein, refers to posters, window cards, still photographs, printed pamphlets, circulars and other similar material advertising and promoting motion picture films.

7.

The term "specialty accessories", as used herein, refers to large posters, elaborate photographs, neo-art transparencies, title cards, banners, and other similar material advertising and promoting motion picture films other than standard accessories.

8.

The defendant, National Screen Service Corporation, (hereinafter "National") is a corporation engaged in the same business as plaintiff, but on a national scale, and competes with plaintiff in the New Orleans motion picture district.

9.

The eight other corporations made defendants in this case, viz: Columbia Pictures Corporation ("Columbia"), Metro Goldwyn Mayer, Inc., also known as Loew's, Inc. ("Metro"), Paramount Pictures Distributing Corporation ("Paramount"), RKO Radio Pictures, Inc. ("RKO"), Twentieth Century Fox Distributing Corporation ("Fox"), United Artists Corporation ("United Artists"), Universal Film Exchanges, Inc. ("Universal"), and Warner Bros. Pictures Distributing Corporation ("Warner"), are the principal motion picture producers and distributors in the United States. They are hereinafter sometimes referred to collectively as the motion picture defendants ant individually by their abbreviated names of Columbia, Metro, Para-

mount, RKO, Fox, United Artists, Universal and Warner respectively.

10.

The motion picture defendants produce and distribute more than ninety percent of the first class feature motion pictures distributed in the United States.

11.

Originally standard accessories were produced and distributed by the motion picture producers, and for some time plaintiff was able to and did obtain supplies directly from all of the motion picture defendants, on the same terms as National.

12.

During the period beginning August 22, 1935, and ending July 1, 1947, National obtained, at various times, from all of the motion picture defendants, exclusive licenses to obtain, reproduce and distribute standard and specialty accessories anywhere within the United States.

13.

During the period beginning January 1, 1940 and ending July 1, 1947, defendant obtained from each of the motion picture defendants an exclusive license to obtain, reproduce and distribute standard accessories within the United States, and from four of the said

motion picture defendants (namely Warner, Fox, RKO and Universal) an exclusive license to obtain, reproduce and distribute specialty accessories within the United States.

14.

Advertising accessories cannot be produced efficiently without the assistance and cooperation of the motion picture producers.

15.

Since the year 1947 National has been the sole producer, or re-producer, of advertising accessories within the United States.

16.

At all times involved in this Complaint the motion picture defendants have had full control of the creation, production and reproduction of the standard and specialty accessories produced for their pictures, and they are the copyright owners of all such standard and specialty accessories.

17.

Beginning about May 1, 1943, National agreed to and did begin to sell plaintiff adequate supplies of standard accessories for the pictures of the three motion picture defendants from whom exclusive distribution licenses had been obtained, namely, Paramount, Met-

ro and RKO; and at the same time National agreed also to sell plaintiff adequate supplies of such accessories for the pictures of all producers who might thereafter grant defendant an exclusive distribution license.

18.

National obtained an exclusive license to distribute standard accessories from Universal in 1944, from Columbia in 1945, from United Artists and Warner in 1946 and from Fox in 1947.

19.

Up to May 16, 1961, National, in accordance with its promise, did actually sell to plaintiff for a number of years, adequate supplies of standard accessories for the pictures of all of the motion picture defendants, but on February 15, 1961, National notified plaintiff that beginning May 16, 1961, it would stop doing so, and National did stop doing so, on May 16, 1961, with the result that since May 16, 1961, plaintiff has been unable to obtain any supplies of standard accessories for any of the pictures produced by any of the motion picture defendants, except during a short period of time when a temporary injunction was in effect.

20.

The dates of National's acquisition of exclusive licenses to obtain, reproduce and distribute specialty accessories for the pictures distributed by the eight

motion picture defendants were as follows:

1935	United Artists
1935	Paramount
1935	Columbia
1937	Metro
1940	RKO
1942	Universal
1944	Fox
1946	Warner

21.

National has at all times refused plaintiff's requests for leave to buy supplies of specialty accessories with the result that since 1946 plaintiff has been unable to obtain any supplies of specialty accessories for any of the pictures produced by any of the motion picture defendants.

22.

Each of the aforementioned exclusive licenses acquired by National contained a provision requiring National to pay a share of the profits derived from the licensee to the licensor, and the licensor made a profit from the transaction.

23.

Each of the motion picture defendants had knowledge of the transactions between the other motion picture defendants and National, and have conspired with

each other and with National in violation of the laws of the United States, to do the things alleged herein.

24.

The business of distributing standard and specialty accessories constitutes a part of interstate commerce.

25.

As a result of the facts hereinbefore alleged, plaintiff has suffered injury to and losses in its business, during the period of time since November 30, 1964, (the date of the filing by plaintiff of a prior complaint against the defendants herein) in the estimated amount of $250,000.00.

26.

Plaintiff demands trial by jury of all issues involved in this case.

WHEREFORE, plaintiff prays:

(a) That the Court adjudge and decree that the defendant National Screen has attempted to monopolize, and has monopolized, interstate trade and commerce, as alleged herein, in violation of Section 2 of the Sherman Act, and that all defendants have combined and conspired in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, as alleged herein.

(b) That the defendant National Screen be perpetually enjoined and restrained from attempting to monopolize or monopolizing interstate trade and commerce in standard and specialty accessories.

(c) That the defendants be individually and collectively enjoined and restrained from carrying out, directly or indirectly, the combinations and conspiracies in restraint of trade and commerce, as hereinbefore alleged, or any combination or conspiracy having similar purposes or effect.

(d) That judgment be entered against defendants, jointly and severally, for treble the amount of damage and loss suffered by plaintiff, viz: treble the amount of $250,000.00 or $750,000.00, and for costs, including counsel fees and for trial by jury.

(e) For trial by jury of all issues involved in this case.

HENICAN, JAMES &
CLEVELAND

(Signed) C. ELLIS HENICAN, JR.
C. Ellis Henican, Jr.
ATTORNEYS FOR
PLAINTIFF
Suite 2601, 225 Baronne Street
New Orleans, Louisiana 70112
Tel: 524-6344

(Signed) FRANCIS T. ANDERSON
FRANCIS T. ANDERSON, T.A.
1103 Alfred Avenue
Yeadon, Pennsylvania 19050
Tel: CL 9-8492

Plaintiff's mailing address:
214 So. Liberty Street
New Orleans, Louisiana 70112

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27902

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellee-
Cross Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION,
Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Northern District of Georgia

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(August 24, 1970)

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

BROWN, Chief Judge: Here we write again in this seemingly ceaseless saga of antitrust litigation[1] between the local distributors of motion picture advertising accessories[2] and the vertically integrated single producer and national distributor of the accessories, National Screen Service Corporation. This chapter, the Atlanta phase, has been elaborated by three previous opinions of this Court.[3]

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[1]This Court has recently written in the New Orleans phase of this litigation and there chronicled some of the history of the litigation and the industry involved. Exhibitors Poster Exchange, Inc. v. National Screen Service, Corp., 5 Cir., 1970, ——— F.2d ——— [No. 26643, January 26, 1970]. The most complete history of this industry is, however, set out in Lawlor v. National Screen Service, Corp., 3d Cir., 1959, 270 F.2d 146, *cert. denied*, 1960, 362 U.S. 922, 80 S.Ct. 176, 4 L.Ed.2d 742. See also Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122; Vogelstein v. National Screen Service Corp., E.D. Pa., 1962, 204 F.Supp. 591; Lipp v. National Screen Service Corp., E.D. Pa., 1960, 188 F.Supp. 245; The Poster Exchange., Inc. v. National Screen Service Corp., N.D. Ga., 1963, 35 F.R.D. 558, aff'd, 5 Cir., 340 F.2d 520; National Screen Service Corp. v. The Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647.

[2]"Standard accessories" consist principally of lithographed posters, large and small, and photographs of scenes from a motion picture, which along with window cards and other similar articles, are displayed in and about theatre lobbies and on billboards in order to stimulate public attendance at a current or future exhibition of a motion picture.

[3]The previous appearances of this case in this Court were:

Poster I: National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647, in which this Court in an opinion written by Judge Gewin affirmed the District Court's denial of National Screen's motion for summary judgment and Poster

The plot of this chapter revolves around monopoly — § 2 of the Sherman Act.[4] Poster claimed that National Screen used its position as the only producer and supplier of standard accessories for motion pictures to "monopolize" the Atlanta area market for the distribution of the accessories to movie exhibitors. Poster alleges two separate acts of monopolization. First, it claims that as far back as the statute of limitations can reach, here it is assumed that that is July, 1957, National Screen refused to provide Poster with an adequate supply of accessories, refused to grant Poster a sublicense, and priced the accessories that were provided at the same price that National Screen distributed material to the exhibitors — the "over-the-counter" price. The second claim was that in 1961 National Screen completely refused to continue supplying any accessories to Poster.

Exchanges motion for preliminary injunction and said there were issues of fact to be resolved;

Poster II: Poster Exchange, Inc. v. Paramount Dist. Corp., 5 Cir., 1965, 340 F.2d 320, in which this Court affirmed the District Court's summary judgment in favor of the film producing companies; and

Poster III: Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1966, 362 F.2d 571, in which this Court, in an opinion written by Judge Tuttle, reversed the District Court's summary judgment in favor of National Screen.

4"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C.A. § 2."

The case was tried without a jury and the District Court found that there had been monopolization and assessed damages of $150,000, tripled pursuant to 15 U.S.C.A. § 15[5] to $450,000. It also awarded attorney's fees of $50,000 to Poster Exchange. National Screen attacks the District Court's finding of liability, finding as to the amount of damages, and the amount of attorney fees awarded. Poster Exchange contends that the amount of attorney's fees awarded was inadequate. We, however, reject all of these contentions. But we remand for additional consideration of the amount of attorney's fees.

I.

This history of this industry-wide dispute has been set out several times by many Courts, including this one, and need not be restated here. (See note 1, *supra*).

National Screen is the sole holder of a license to produce and distribute standard accessories for the large domestic movie producing companies.[6] It ob-

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[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C.A. § 15.

[6] The production companys for which National Screen produced and distributed accessories are Paramount Film Distributing Corporation, Warner Brothers Pictures Distributing Corporation, Universal Film Exchange, Inc., Columbia Pictures Corporation. United Artist Corporation, 20th Century Fox Film Corporation, as well as RKO and Loew's.

tained this position after a substantial number of firms were already in the business of marketing the accessories to motion picture exhibitors. Poster is a local distributor-jobber in the Atlanta area.

Without specifics and details reflected in the numerous prior opinions, the claim made here took this shape. Prior to 1940 the major domestic motion picture producers produced and distributed standard accessories through local distributor-jobbers in major cities. Between 1940 and 1947 National Screen was licensed[7] by the producing companies to be the exclusive producer-distributor of standard accessories and to distribute them on a nationwide basis.

Armed with the exclusive licenses National Screen in 1943 bought out 28 of the local distributor-jobbers. In 1943 Philadelphia area jobber-distributors brought an antitrust action — the "Allied Suit". Shortly thereafter it was settled and National Screen agreed to sublicense the plaintiffs in that action, and did grant them and some others sublicenses. But even though Poster began making requests for such a sublicense as early as 1943 and made this request repeatedly, National Screen refused to grant it a sublicense. Meanwhile National Screen had entered the Atlanta Exchange Mar-

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[7]In 1940 National Screen obtained an exclusive license from Paramount and RKO. In 1942 such a license was obtained from Loew's, Inc. and the other big domestic producers were soon distributing standard accessories through National Screen:

Universal	August 1, 1944
Columbia	April 12, 1945
United Artists	January 21, 1946
Warner	July 1, 1947
Fox	March 22, 1946

ket. During this period National Screen did, however, supply Poster with accessories, but only in limited quantities, not enough for Poster to supply its customers. The prices charged were substantially higher than those paid by other sublicenses. In fact the prices were the same that National charged the other exhibitors — the over-the-counter prices.

About 1950, when the original exclusive licenses from the producers expired, National Screen entered into nominally nonexclusive agreements with all of the producers. These agreements, however, contained a type of "Most Favored Nation Clause" that prohibited the producer from granting other licenses unless the prospective licensee agreed to establish a nationwide distribution system like that of National Screen, and agreed to a full line production of accessories.

In 1954 the United States filed an antitrust action in the Southern District of New York (see note , *infra*). And pursuant to a consent decree of 1957, National Screen considered itself obligated to continue to grant sublicenses.[8] The nominally nonexclusive provision of the license from the producers was also retained. Although during these years Poster had survived without a sublicense, its market share declined drastically. In about 1942-43 it had about 60% of the market in the Atlanta area, but by 1961 its share had declined to only 24%. In these years National Screen's

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[8]The Consent Decree does not specify under what conditions National Screen was to deal with distributor-jobbers. But it is very clear that it considered itself obligated for a year — another unspecified limitation.

share, which was zero when it started, rose to over 70%. In 1961 National Screen leveled its final blow. It adopted a nationwide policy under which it refused to provide accessories to any distributor-jobber. Following this, Poster's share of the market fell to 2%. In 1957 it had 200 — 225 customers; in 1961 it had 15.[9] The District Court found that National Screen's pre-1961 acts of refusing to provide an adequate supply of accessories and charging "top prices", as well as the 1961 complete refusal to deal, occurred and were motivated by the intention to drive Poster out of the market.

II.

National Screen presents three challenges to the District Court's findings and conclusions. In the first, a double-feature National Screen argues that liability is prohibited by the 1957 consent decree entered in the Government antitrust suit[10] and because *Lawlor v. Na-*

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[9]Keeping the figure of the trade, Poster, in a verbal "trailer", has amply stated the essence of its two real claims:

> "It appears from the evidence that the defendant effectively stifled the plaintiff's business by degrees. First, entering exclusive contracts with the major producers, followed by refusal to grant a sub-license to the plaintiff to deal in standard accessories, followed by tactics making it difficult and impossible for the plaintiff to buy adequate supplies over-the-counter from the defendant, and finally, on May 16, 1961, by absolutely refusing to make any supplies whatever available to the plaintiff at any price, this being the final crowning blow."

Poster's Brief, p. 47.

[10]The Consent Decree was entered in United States v. National Screen Service Corp. (civ action 17-138, 1957 C.C.H. Trade Cases ¶68,670).

tional Screen Service Corp., 3 Cir., 1959, 270 F.2d 146, *cert. denied*, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742 is controlling. These contentions have, however, been presented to this Court twice and have been rejected twice, first in Judge Gewin's 1962 opinion in Poster I and again in Judge Tuttle's opinion in Poster III in 1966. (See note 3, *supra*). We reject them thrice.[11]

Second, National Screen contends that Poster in pretrial response to a discovery request and in its pleadings, there had been admissions that precluded imposing liability for pre 1961 acts. But we think it is plain that the District Court did not read these as reflecting a final, absolute judicial admission; nor do we. At most they related solely on the ultimate issues as just a few more pieces of evidentiary footage, which the District Court could, but was not required to credit. As a last reel, the whole trial would have been a waste. That De Mille epic would not have been carried out if anyone, including the Judge, believed that Poster Exchange after years of protest were now telling the Judge that until 1961 everything was rosy.

National Screen's third contention, which is closely related to the second, is that the District Court's fact

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[11]As to the 1957 decree we do not believe that either United States v. Borden Co., 1954, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903; Sam Fox Publishing Co., Inc. v. United States, 1961, 366 U.S. 683, 81 S.Ct. 309, 6 L.Ed.2d 604; K-91 Inc. v. Gershwin Publishing Corp., 9 Cir., 1967, 372 F.2d 1, *cert. denied*, 1968, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838; or other cases referred to by National Screen support the position that this consent decree had nationwide res judicata, collateral estoppel effect on persons who were not parties or involved.

findings upon which the conclusion of Sherman Act liability is based are not supported. But this challenge begins with the heavy burden of F. R. Civ. P. 52(a)'s clearly erroneous standard. *Lawlor v. National Screen Service Corp.*, 3 Cir., 1959, 270 F.2d 146, 152, *cert. denied*, 1960, 362 U. S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742. This greatly simplifies our quest. There is direct testimony of present and former employees of Poster Exchange as well as testimony of former National Screen employees that prior to 1961 National Screen had restricted the number of accessories available to Poster and priced the accessories that were supplied at a "top price". The testimony also showed that this as, well as the 1961 complete refusal to deal, was done with the intention of driving Poster out of the market.[12] On this approach we think that there was quite enough to warrant the District Court's fact finding.

These three challenges are really previews. The main feature here is National Screen's argument that even on the facts found there can be no § 2 liability. The review of that argument starts with the central

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[12]There is no doubt that the general rule requires a finding of specific intent to monopolize. See Schine Chain Theatres v. United States, 1948, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245; National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir., 1962, 305 F.2d 647. And we have such a finding here. But we also have a finding that a monopoly would result from National Screen's conduct. As the Court said in United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S.Ct. 941, ——, 92 L.Ed. 1236, 1242, it is "not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws had been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement."

element of the plot — National Screen was the only producer of standard accessories. During the period for which liability is asserted, National Screen's licenses from the producers were only nominally non-exclusive.[18] National Screen certainly had, as the District Court found, monopoly power within all conceivable market conditions. In order for another company to have acquired a license it would have had to make a multimillion dollar investment. The producing companies required under their "Most Favored Nation" clauses required nationwide distribution facilities, full line producing and direct competition with National Screen's already established organization. Moreover, Poster was only a local distributor-jobber. And the District Court was entitled to conclude that Poster cannot be required to convert the nature of its business, make a multimillion dollar investment and become a nationwide distributor just to survive in the Atlanta area. See *United States v. Aluminum Company of America, Inc.*, 2 Cir., 1945, 148 F.2d 416.

The District Court's fact finding, which comes under Rule 52(a)'s clearly erroneous umbrella, was that Na-

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[18]National Screen acquired its position as the sole producer of standard accessories for motion pictures produced by the major domestic producers in the 1940s under exclusive contracts. We do not pass on the legality of those exclusive dealing contracts. See *Lawlor, supra*. It is enough here that National Screen had monopoly power at the manufacturing level and used it to prevent competition at the distributor-jobber level. As the Court said in United States v. Griffith, 1948, 334 U.S. 100, 107, 68 S.Ct. 941, ——, 92 L.Ed. 1236, 1243, it "follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

tional Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level. Such conduct has long been held to violate § 2. This is just the type of evil that the prohibitions on tying and other such per se violations are aimed at. As Mr. Justice Clark said in *Times-Picayune Pub. Co. v. United States*, 1953, 345 U.S. 594, 611, 73 S.Ct. 872, ——, 97 L.Ed. 1277, 1291, "the essence of illegality ... is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."

Moreover, the Supreme Court has long ago condemned a vertically integrated manufacturer-retailer from using its power at one level to drive out competition at another. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 1927, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684, a retail distributor of photographic equipment brought a private antitrust action seeking recovery under § 2. The jury found that Eastman had refused to continue selling photographic equipment to plaintiff at a wholesale price and that Eastman's activities were motivated by a desire to eliminate plaintiff as a competitor in the Atlanta retail market. The Supreme Court held that there had been a § 2 violation.

National Screen was found to have engaged in the same kind of intentional monopolistic conduct. And this conduct cannot be defended on the ground that it was only the exercise of legitimate business judgment. National Screen did introduce an accounting analysis that

indicated that in the years preceding[14] 1961 it did sustain nationwide losses in its Standard Assessory Division.[15]

But National Screen for its own inarticulated reasons stayed in the business,[16] either as a loss leader, feeder, or for whatever reason. And the District Court was entitled to infer that National Screen's decision to stay in the standard accessory business even in the face of losses indicated that its decision to stop dealing with distributor-jobbers was not "dictated by sound business policy." And there was no evidence that dealing through distributor-jobbers was more expensive than dealing directly with the exhibitors. Nor was there any indication that efficiency could be improved by dealing directly. *Times-Picayune, supra.*

There can be no doubt that becoming a complete monopoly may improve a business' financial condition. But becoming a monopoly simply to make more money is not a "legitimate business justification" for "monopolizing".

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[14]

1959	$161,200
1960	$ 84,058
1961	$244,900

[15]There was evidence that indicated that in some licenses from some producers there were percentage-of-profits provisions under which National Screen did however, continue to make payments to producers from its Atlanta operation. We do not, however, consider these payments the basis for the District Court's finding nor of central importance here.

[16]After the 1961 decision to stop dealing with distributor-jobbers became effective, losses as computed by the accounting firm relied on by National Screen went up.

1962	$381,056
1963	$415,933
1964	$523,511

III.

National Screen's objection to the amount of damages assessed also must overcome the high hurdle of the Rule 52(a) clearly erroneous standard. And here that standard is raised even higher by the well established rule that although the fact of injury must be certainly proved, the amount of loss, because of its very nature, can be estimated on any reasonable basis. *Eastman Kodak Co. v. Southern Photo Materials, supra; Bigelow v. RKO Radio Pictures, Inc.*, 1945, 327 U.S. 251, 66 S.Ct. 144, 90 L.Ed. 652; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 1931, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544.

National Screen's basic argument about the amount of damages is that Poster was entitled to recover damages only from the time of the complete refusal to deal in 1961.[17] In final analysis, however, this contention rests on the argument that Poster had by pre-trial admissions abandoned its theory of liability for the pre-1961 acts and on the argument that the District Court's findings of fact regarding this period are not supported by the record. We have of course rejected both of these contentions. Thus on the findings we have credited that Poster was entitled to recover damages for that wrong as well as for injury resulting from National Screen's complete refusal to deal in 1961.

Our assaying the reasonableness of the $150,000 in damages found by the District Court can be based on the formula — a comparison of the net receipts of the

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[17]Damages were claimed up to the time this suit was filed in the summer of 1961.

parties — Mr. Justice Stone set out in *Bigelow, supra.* For there is no doubt that there was ample basis for using that formula here.[18] And it is clear that use of the *Bigelow* formula is not precluded by *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 5 Cir., 1967, 383 F.2d 97, *cert. denied*, 1968, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870, referring to it. Under the *Bigelow* formula the District Court might have awarded a sum quite in excess of $150,000 in actual damages.[19]

In view of the grossly predatory practices engaged in by National Screen and the fact that Poster's once substantial business had been almost destroyed, certainly the $150,000 awarded was not excessive.

IV.

Both National Screen and Poster Exchange are dissatisfied with the amount of attorney's fees awarded. National Screen claims the $50,000 awarded is grossly excessive while Poster claims it is completely inade-

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[18] There is no surmise or conjecture about the applicability of *Bigelow*. There was an established business with a substantial part of the market and that business was a profitable operation. That operation, however, became less and less profitable while National Screen, which started from nothing, captured most of the market by predatory practices. And there can be no doubt that National Screen and Poster had similar relations with exhibitors and were certainly handling fungible goods.

[19]

	Poster Exchange	*National Screen*
Gross Receipts	$264,297	*$929,245
Cost of inventory	$145,005	$492,500
Net receipts	$119,292	$436,745

*Atlanta Exchange area only.

quate and requests that the award be increased by $100,000. At the outset we think the services were worth at least $50,000 for work done at the District Court level and we affirm the District Court's award as a floor. See *Grigsby v. Coastal Marine Service*, 5 Cir., 1969, 412 F.2d 1011, 1042. We believe that this matter should be remanded for consideration of factors, which we apprehend were perhaps not given appropriate consideration or weight by the District Court.[20] The District Court should consider the time, difficulty, and perseverance required to succeed against such formidable, resourceful opposition to determine whether the $50,000 award should be increased. Independently of the fee fixed for work at the District Court level, the Judge should also fix the fee for all of the appellate work including that done on the instant appeal. He should take into account all of the factors including those briefly summarized here. Although National Screen contends the case is simple, it required 111 pages for its pre-argument briefs and it has also filled a post-argument brief. Counsel for Poster was required to respond at length and here it might be appropriate to repeat, moreover, that this is the fourth time this case has been in this Court. We feel that this is the time to compensate the attorneys for the tenacity displayed in this litigation.

AFFIRMED IN PART AND REMANDED IN PART.

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[20] We do not put this in terms of abuse of discretion. Abuse of discretion is undoubtedly the proper standard for review, not artificial percentage of the single damages. See W. W. Montague & Co. v. Lowry, 1904, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608; Volasco Products Co. v. Lloyd A. Fry Roofing Co., 6 Cir., 1965, 346 F.2d 661, *cert. denied*, 382 U.S. 904, 86 S.Ct. 239, 15 L.Ed. 2d 157.

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No. 763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN
and WILLIAM D. TREEBY
Stone, Pigman, Walther,
Wittmann & Hutchinson
1200 Whitney Bank Building
New Orleans, Louisiana 70130

Attorneys for Columbia Pictures Corporation, Metro - Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corp., Petitioners.

BERNARD G. SEGAL and
EDWARD W. MULLINIX
Schnader, Harrison, Segal
& Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102
LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin,
Krim & Ballon
477 Madison Avenue
New York, New York 10022
GIBBONS BURKE
Chaffe, McCall, Phillips, Burke,
Toler & Sarpy
National Bank of Commerce
Building
New Orleans Louisiana 70112

Attorneys for National Screen Service Corporation, Petitioner

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Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1969). 2, 3

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Lawlor v. National Screen Service Corp., 270 F.2d 146 (3d Cir. 1959) 4

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Poster Exchange, Inc. v. National Screen Service Corp., (not officially reported at this date), CCH Trade Reg. Rep. ¶ 73,305 (5th Cir. Aug. 24, 1970). 3

Poster Exchange, Inc. v. National Screen Service Corp., Civil Action No. 7665, U.S. District Court, Northern District of Georgia (1969). 6

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 56(e) 5

Sherman Act. §§ 1, 2, 15 U.S.C. §§ 1, 2. 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 763

NATIONAL SCREEN SERVICE CORPORATION, et al

Petitioners

versus

EXHIBITORS POSTER EXCHANGE, INC.

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

The Court need only examine the initial question presented for review, as stated both by Petitioners[1] and Respondent,[2] to determine that certiorari should be granted. It is the same question that has been before the lower federal courts since 1961 and, simply stated, it is whether under present federal antitrust laws a complaint based on a continuing course of allegedly illegal business activity can result in a judgment concluding, *once and for all*, the legality of that activity as between the parties. Petitioners contend that it can;

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[1] Petition for Certiorari, p. 2.
[2] Respondent's Brief in Opposition, p. 1.

Respondent insists that it cannot. Each position finds support in a decision of a different court of appeals. Petitioners' answer is based on the Eighth Circuit's decision in *Englehardt*;[3] Respondent's answer is now based on the decision of the court below.

The conflicting answers result from acceptance by the court below of Respondent's misreading of this Court's decision in *Lawlor*.[4] Respondent expressly acknowledges in its Brief in Opposition[5] that the claim in this case is "based on the same monopoly" as the "two preceding cases" but attempts to escape from res judicata and collateral estoppel by an insistence on reading *Lawlor* as authority for the proposition that subsequent time periods necessarily mean new causes of action. Acceptance of this proposition would mean that conduct previously adjudged to be legal could, through the mere passage of time, become illegal. Such a metamorphosis would inevitably result in the elimination of the concept of res judicata from our jurisprudence.

Respondent also seeks to revive a second novel contention, properly rejected "out of hand"[6] by the Court of Appeals, that a summary judgment cannot serve as the basis for collateral estoppel. Acceptance of this contention would lead to an equally absurd result, *viz:* elimination of the summary judgment device as an effective procedure for disposition of cases that do not involve a factual dispute. Of course, a summary judgment can have collateral estoppel effect, and the Court

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[3] Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964).

[4] Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955).

[5] Respondent's Brief in Opposition, p. 2.

[6] Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313, at p. 1319, Appendix to Petition, p. 39.

of Appeals here conducted its own "painstaking examination" of the record to determine the specific issues disposed of in Suit No. 1 and in Suit No. 2[7] — a determination which Respondent does not and cannot challenge.

The need for certiorari in this case is apparent from a reading of the Petition and Respondent's opposition as summarized above. However, the other points made in the Brief in Opposition require a brief response in order to set the record straight. Our response on each of these points is numbered to conform with the numbers assigned the points in the Brief in Opposition.

(1)

This is not the time to argue about the decision in the *Poster Exchange* case,[8] despite Respondent's curious tactic of reproducing the opinion in that case as an appendix to the Brief in Opposition. That case will be dealt with appropriately in a Petition for Certiorari now being prepared by National Screen.

What must be dealt with here, however, is Respondent's attempt to argue away the significance of the trial in the *Lawlor* case. In asserting that, "The Court entered no finding of fact with respect to either monopoly or conspiracy, and only qualified conclusions of law",[9] respondent grossly misrepresents the decision in *Lawlor*.

The trial judge in *Lawlor* expressly found that each of the Producers' license agreements relied on by the

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[7] 421 F.2d at p. 1320, Appendix to Petition at pp. 41-42.
[8] Poster Exchange, Inc. v. National Screen Service Corp., CCH Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970).
[9] Respondent's Brief in Opposition, p. 7.

plaintiff there and Respondent here was entered into without consultation with any other motion picture company, independently of the action of any other company, and solely on the basis of the licensor's own business interests."[10] The trial judge, based on these and other findings, unequivocally concluded that National Screen "did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act" and that neither National Screen nor any of the Producers combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."[11]

The Court of Appeals for the Third Circuit, in affirming the decision in favor of the defendants in *Lawlor*, noted that, "the great weight of credible evidence clearly shows that the film companies, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task."[12]

(2)

Respondent resorts to play on words when it says that it is "not true at all"[13] that it is undisputed that Respondent is relying for the third time on the same facts as to Petitioners' liability. Respondent's only point is that the time period is different.

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[10] Lawlor v. National Screen Service Corp., Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958), Findings 37, 60, 64, 76, 82, 89, 102, 106.

[11] *Id.*, Conclusions of Law 3 and 4, 15 U.S. §§ 1, 2.

[12] Lawlor v. National Screen Service Corp., 270 F.2d 166 (3d Cir. 1959).

[13] Respondent's Brief in Opposition, p. 8.

This Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[14] has no relevance here. The holding in that case was that there was a continuing violation of the antitrust laws from 1912 until 1955 because *United* refused to sell shoe machinery and insisted on only leasing the machines. Plaintiff was permitted to recover damage caused by that policy during the statutory period. No prior suit was involved, res judicata was not an issue, and the holding hardly means that the plaintiff could also have recovered for the later period if it had sued earlier and had suffered a determination that the facts relied on did not amount to a violation.

Petitioners do not seek immunity from liability for "future violations." They seek protection against repetitive litigation of the same issues which have been twice previously determined against Respondent.

(3)

Petitioners' motions for summary judgment were supported by a showing of the prior judgments in their favor. Our point under Rule 56(e)[15] is that Respondent could have avoided the summary judgment which the District Court correctly ordered only by showing by affidavits or testimony that Respondent relied on the existence of new unlawful conduct which allegedly occurred after 1961. This Respondent altogether failed to do.

(4)

Respondent resorts again to invective and distortion. Its characterization of Petitioners as "conscienceless mo-

[14] 392 U.S. 481 (1968).
[15] Federal Rules of Civil Procedure, Rule 56(e).

nopolists"[16] flies in the teeth of prior adjudications that there has been no violation of law and is only buttressed by a shameful use of a truncated, inaccurately introduced quotation from the decision of the United States District Court for the Northern District of Georgia in the Poster Exchange case, which did not deal at all with National Screen's "veracity." The full paragraph from which Respondent wrenched the misleading quotation on page 11 of the Brief in Opposition reads as follows:[17]

> "So, in view of the above-quoted language [from UNITED STATES V. GRIFFITH, 334 U.S. 100, 105 (19), holding that a finding of specific intent to restrain trade or build a monopoly is not necessary to a conclusion that there has been a violation of the antitrust laws], it appears to this Court that National Screen now cannot be heard to say that it did not intend to monopolize but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase."

National Screen made no such admission in the Poster Exchange case, and there was no evidence whatever in that case to support the conclusion just quoted. Furthermore, we note in passing that the District Court in the *Lawlor* case, which had before it the same facts

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16 Respondent's Brief in Opposition, p. 10.

17 Poster Exchange, Inc. v. National Screen Service Corp., Civil Action No. 7665, U. S. District Court, Northern District of Georgia, Judgment of February 14, 1969, p. 16.

as to National Screen's acquisition of various poster renters in 1940, reached no such conclusion."[19]

(5)

Here, again, Respondent begs the question by insisting that Petitioners are engaging in a continuing violation of the antitrust laws, in spite of the summary judgments in the two prior actions concededly based on the same facts and allegedly unlawful conduct. It is at least clear that Respondent is relying on the same facts twice previously adjudicated not to violate the antitrust laws.

(6)

Respondent's reading of this Court's decision in *Lawlor* may be plain enough to Respondent, but it has engendered the obvious confusion suffered by the court below.[19] Moreover, *Lawlor* has resulted in diametrically opposed interpretations by the Courts of Appeals for the Sixth and Eighth Circuits.

The Court of Appeals for the Eighth Circuit, in *Englehardt*,[20] dealt with a claim of continuing damage resulting from defendant's refusal to deal with plaintiff and defendant's enforcement of that refusal by threatening and boycotting other dealers to prevent them from dealing

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[19] Lawlor v. National Screen Service Corp., Civil Action No. 10,600 (E.D. Pa. Oct. 22, 1953). The District Court's Finding of Fact 42 recited the fact of the poster renter acquisitions. The court there rejected Finding 88 requested by the plaintiff which read:

"At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States."

[19] Petition for Certiorari, p. 13.

[20] Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964).

with plaintiff."[1] Just as that case involved the "single controversy" urged by Respondent in attempting to distinguish it, this case, too, involves a single controversy — viz., whether National Screen's 1961 refusal to deal with Respondent amounts to a violation of the antitrust laws. The court's holding in *Englehardt* was that *Lawlor's* rejection of res judicata depended on new and different conduct in the later time period. Accordingly, the Court in *Englehardt* held that *Lawlor* did not preclude res judicata from barring a claim based on alleged continuing violations which were the subject of an earlier case decided adversely to the claimant. In other words, a mere difference in time period did not mean that there was a new cause of action for the purpose of determining the applicability of res judicata.

Thus, despite the efforts of the court below and of Respondent to distinguish *Englehardt*, it is apparent that the Court of Appeals for the Eighth Circuit did not read *Lawlor* as Respondent reads it. It is equally clear that the court below reached a result consistent with Respondent's reading.

Finally, in a factually distinguishable context, the Court of Appeals for the Sixth Circuit, in *Cream Top Creamery v. Dixie Milk Co.*,[2] indicated its reading of *Lawlor* is incompatible with the Eighth Circuit's reading in *Englehardt*. Relying on *Lawlor*, *Cream Top Creamery* would seem to allow repetitive suits attacking as illegal

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[1] See 327 F.2d at p. 33 for further details of the allegations in the complaints there.

[2] 382 F.2d 282 (1967). Whereas Respondent's suit and *Englehardt* involved a continuing pattern of refusal to deal, allegedly illegal, Cream Top Creamery involved a continuing pattern of sales allegedly discriminatory as to price.

a pattern of alleged antitrust violations previously judged to be legal."[23]

Respectfully submitted,

BERNARD G. SEGAL and
EDWARD W. MULLINIX,
Schnader, Harrison, Segal
& Lewis
1719 Packard Building
Philadelphia, Pa. 19102

LOUIS NIZER and
WALTER S. BECK
Phillips, Nizer, Benjamin,
Krim & Ballon
477 Madison Avenue
New York, New York 10022

GIBBONS BURKE
Chaffe, McCall, Phillips, Burke,
Toler & Sarpy
National Bank of Commerce
Building
New Orleans, Louisiana 70112
Attorneys for National Screen Service Corporation, Petitioner.

PAUL O. H. PIGMAN,
PHILLIP A. WITTMANN, and
WILLIAM D. TREEBY,
Stone, Pigman, Walther,
Wittmann & Hutchinson
1209 Whitney Bank Building
New Orleans, Louisiana 70130
Attorneys for Columbia Pictures Corp., Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corp., Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corp., Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Reply Brief have been served in accordance with paragraph 1 of Rule 33 of the rules of this Court on the 30th day of October, 1970.

PAUL O. H. PIGMAN

[23] *Id.*, at p. 363.